

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
2 -----x
2 UNITED STATES OF AMERICA,
3
3 Plaintiff,
4
4 v. Civil Action
4 No. 41-1395 (WCC)
5
5 AMERICAN SOCIETY OF COMPOSERS,
6 AUTHORS AND PUBLISHERS, et al.,
6
6 Defendants.
7
7 -----x
8 In the Matter of the Application of
8 AMERICA ONLINE, INC.,
9
9 Applicant,
10
10 for the Determination of Reasonable
11 License Fees
11
12 -----x
12 In the Matter of the Application of
13 REALNETWORKS, INC.,
13
13 Applicant,
14
14 for the Determination of Reasonable
15 License Fees
15
16 -----x
16 In the Matter of the Application of
17 YAHOO! INC.,
17
17 Applicant,
18
18 for the Determination of Reasonable
19 License Fees.
20
20 -----x
21
21
22 United States Courthouse
22 White Plains, N.Y.
23 July 16, 2008
24
25 Before: THE HONORABLE WILLIAM C. CONNER, District Judge
CHRISTINA M. ARENDS-DIECK, RPR, RMR, CRR
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THE COURT: Good morning.
I've read ASCAP's and the Applicants' rather voluminous submissions. I have briefly scanned ASCAP's responsive letter to the Applicants' submission. I didn't have full time because I had another conference before this one this morning.
It seems to me you're agreed on everything except the main thing, and that is the amount of revenue that ought to be the rate base on which the computation is performed.
I think, as a guiding rule, the only thing that ought to be excluded from the Applicants' revenues is revenue that is received for a product or service that is separately charged for and that is not delivered through the internet portal. Now, I make one exception to that. I know that downloads are delivered through the internet portal, and, according to my prior ruling, they should not be included in the revenue base subject to the formula for determining the fees.
I don't know how we should proceed this morning, but I think one useable or useful thing would be to take Mr. Steintal's letter and go through it item by item and let him convince the Court that this is something that is separately charged for and is not in any way connected with the internet portal, with the one exception that I indicated, and to let ASCAP respond item by item. But if you've got a better suggestion, I'm not locked into that procedure.

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MR. STEINTHAL: I'm happy to proceed that way, your Honor.
THE COURT: What do you think, Mr. Glancy?
MR. GLANCY: Well, that's fine, your Honor.
Perhaps it would be worthwhile just having a brief discussion about what you just said were the guiding principles of this exercise, because it's not entirely clear to me, then, although it may just come up in the item-by-item discussion.
THE COURT: All right. I'll be glad to hear from you. Do you want to speak first or do you want to respond to what Mr. -- you seem to be under the greatest compulsion to speak,

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20 overall revenue, when you're using it in the context of what
 21 they're paying, you're looking at this overall revenue
 22 confining yourself to advertising revenue on their network and
 23 nothing else. And that's why we have an apples to oranges
 24 situation here, because we've got businesses that are not just
 25 advertising businesses here, but connectivity businesses, you

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1 know, B-to-B services. That's where the difference lies.
 2 And I know I tried to make this argument and I was not
 3 successful in it during the trial, but I will tell you that
 4 that's where the interpretation issue comes in. The networks
 5 are looking at what they pay as a percentage of their
 6 advertising revenue, and that's it.

7 THE COURT: When you say the advertising revenue,
 8 that's the same as their total revenue.

9 MR. STEINTHAL: No, it isn't. Not if you -- if you
 10 make it apples to apples and you look at an enterprise, the
 11 licensee, your Honor, in that situation, call it ABC, Inc. or
 12 NBC, Inc., that corporation operates a program service called
 13 the NBC Network and it operates a number of divisions that are
 14 part of the licensee, like a home video business. When you're
 15 looking at percentages of revenue, you are looking at the
 16 percentage of advertising only from the program service. And
 17 that's what ASCAP's TV licenses provide for in the definition
 18 of revenue. They don't define it as licensees' revenue. They
 19 define it as programming service revenue. And a programming
 20 service derives revenue from selling ads and whatnot on the
 21 distribution of that service.

22 What we have here, because of the nature of the
 23 internet, is we've grouped together bunches of revenue that are
 24 more than advertising, and that's what's creating, in our view,
 25 the big problem. And I don't believe, in all fairness, a TV

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1 network looks at what they're paying when they look at a
 2 percentage of their ad revenue and makes any kind of relative
 3 assessment of what your decision here is as a percentage of
 4 Yahoo!'s total revenue or AOL's total revenue, because they're
 5 very different businesses.

6 So it will play out in due time. But I assure you
 7 people are not looking at your decision and saying, great, now
 8 let's go to ASCAP and try to carve down what we're paying based
 9 on that decision. That's not going to happen.

10 THE COURT: Well, this is all an interesting
 11 philosophical exercise, but it isn't relevant to what we're
 12 doing here today. It's an argument that I'm sure you'll make
 13 to the Court of Appeals, but it's a closed issue here.

14 MR. STEINTHAL: Understood.

15 THE COURT: All right.

16 Anything more that needs to be said or done?

17 MR. GLANCY: Several things, your Honor, if I may.

18 Are we going to address the issue of the stay?

19 MR. STEINTHAL: Yes. That's the one last thing.

20 THE COURT: Oh, all right.

21 I would think that ASCAP is not taking any substantial
 22 financial risk in a stay, or if the judgment is stayed pending
 23 appeal. I don't think that AOL or Yahoo! are going to become
 24 bankrupt or insolvent during the time of appeal, particularly

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25 if Mr. Steinthal is able to get an expedited appeal. At one
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1 time, there was suggestion that RealNetworks had some financial
2 problems, but --

3 MR. STEINTHAL: Your Honor, I don't know where that
4 suggestion came from.

5 THE COURT: I think that requiring a bond is really an
6 unnecessary nuisance to the applicants, because I don't think
7 there's any financial risk involved. You're going to get paid
8 in the long run whatever the Court of Appeals decides you're
9 entitled to.

10 MR. GLANCY: Well, your Honor, in these uncertain
11 times, with the economy the way it's going -- and we've seen
12 the internet bubble burst in the 2000/2001 time frame and many
13 solid companies go under. And ASCAP itself lost money when DMX
14 declared bankruptcy. And I don't know whether, you know, a
15 year prior to that or 18 months prior to that, one could have
16 looked at DMX and said, well, they're a solid company; they're
17 not going to go under.

18 I do know that the Court of Appeals is taking about 18
19 months to decide things. And I don't know what the lay of the
20 land will be in 18 months for these companies. But I think
21 that, given the size of their revenues and that they should
22 really have no difficulty in posting the bond, at least to
23 protect ASCAP in the event of default or bankruptcy. It's
24 required by Rule 62 for obtaining a stay of enforcement of the
25 money damages. And I don't think that they can say that it

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1 creates an undue burden for them. It may be a nuisance, but,
2 with all due respect, I mean --

3 THE COURT: Well, the amount of money that's involved,
4 I know that ASCAP made some press releases about the value of
5 the judgment to them. I was unable to reconstruct their
6 figures, but the bond would cost some percentage of that. I
7 don't know.

8 MR. STEINTHAL: Your Honor, I don't think we're in a
9 situation of risk here. In addition, they've just gotten the
10 benefit of getting the interest compounded instead of simple,
11 and the combination of the cost of a bond that's largely
12 unnecessary and giving them the benefit of compound instead of
13 simple, I just think it's unnecessary.

14 THE COURT: I'm inclined to agree. I don't think
15 there is any real risk. Certainly Microsoft would be horrified
16 to learn that the financial soundness of Yahoo! was being
17 publicly questioned. Let's let it go at that.

18 MR. GLANCY: Well, as regards to over the next 18
19 months, we would like to make an application, then, to increase
20 interim fees, or we could just not stay that portion of the
21 agreement and they could pay under the judgment as entered by
22 your Honor during the pendency of the appeal. But it seems to
23 me unfair that Yahoo! should still continue to pay something
24 like \$200,000 a year over the next 18 months when we all know
25 that, at the end of the day, it's -- and they've been paying

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1 that as interim fees for a while, and, at the end of the day,
 2 they're going to have to pay substantially more than that.
 3 MR. STEINTHAL: Your Honor, I'm prepared to take to
 4 Yahoo!, if that's their concern, the issue of Yahoo!'s interim
 5 fees, which were set on a lump-sum basis several years ago.
 6 I'm sure we can work something out so that there is an
 7 adjustment in Yahoo!'s interim fee payments to ASCAP. I have
 8 no problem taking that back.
 9 THE COURT: Well, if you aren't successful in
 10 convincing them to come up to date on the interim fees, I'll
 11 reconsider the question about a bond --
 12 MR. STEINTHAL: Fair enough.
 13 THE COURT: -- for supersedeas of the judgment.
 14 Anything more?
 15 MR. GLANCY: Just, your Honor, it's on a different
 16 matter, but we have a difficulty. With respect to YouTube and
 17 Google, we filed an application for determination of final
 18 fees. With respect to YouTube, we've sent data requests to
 19 Google. They're in the process of retaining counsel. And I
 20 know they've been in discussions with Mr. Steintal, and I wish
 21 him the best of luck in getting that retention, but,
 22 apparently, there's some issues there that have not been
 23 resolved, and it's been over two months now, almost two months
 24 now, since we filed the rate proceeding and issued discovery
 25 requests, and we just have no mechanism, really, for moving
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1 things along here.
 2 MR. STEINTHAL: Your Honor, let me speak to that. And
 3 I can't speak technically on behalf of YouTube because we have
 4 not been formally engaged yet. We were asked by YouTube to
 5 represent them. There are some conflict issues that are taking
 6 longer than I would have liked to work out. I believe they
 7 will get resolved shortly, enabling us to represent YouTube.
 8 But the good news is we have conveyed to the inhouse
 9 lawyer at YouTube, two of them, their general counsel and one
 10 of their senior lawyers, who used to work with me, the
 11 information from the conference of a week ago about what the
 12 schedule is in the other cases. They are busily pulling
 13 together internally the information that they're going to need
 14 so that they can be on the same schedule as everybody else.
 15 So it's not like they're in a fog, waiting until some
 16 later date, and not going to be able to act consistent with the
 17 schedule that your Honor outlined with the closure of discovery
 18 of October 31 and a pretrial conference on October 10.
 19 So they are, inhouse, doing the same things that they
 20 would be doing whether we were formally engaged or not. That,
 21 I can represent to you.
 22 THE COURT: All right.
 23 MR. STEINTHAL: So we'll try to get this thing
 24 resolved. And I can assure you that the YouTube folks will be
 25 in touch directly with ASCAP on these issues pending our
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1 dealing with our formal issue.
 2 THE COURT: All right. Thank you.
 3 MR. GLANCY: Thank you.
 4 THE COURT: I'll look forward to getting your
 5 submissions.